

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ROBERT J. WEST,

Plaintiff,

v.

Civil Action No. 5:04CV132  
(STAMP)

MICHAEL J. ASTRUE,<sup>1</sup>  
Commissioner of Social  
Security Administration,

Defendant.

**MEMORANDUM OPINION AND ORDER**  
**ADOPTING AND AFFIRMING REPORT AND**  
**RECOMMENDATION OF THE MAGISTRATE JUDGE**

I. Background

On June 8, 2007, the plaintiff, Robert J. West (hereinafter "the claimant"), filed a motion for an award of attorney's fees pursuant to 42 U.S.C. § 406(b)(1). The Commissioner responded to the claimant's motion and the claimant replied. This matter was referred to United States Magistrate Judge James E. Seibert for submission of proposed findings of fact and recommendation for disposition pursuant to 28 U.S.C. §§ 636(b)(1)(A) and 636(b)(1)(B). Magistrate Judge Seibert considered the claimant's motion for an award of attorney's fees under 42 U.S.C. § 406(b)(1) and the response and reply thereto and submitted a report and recommendation. In his report, the magistrate judge recommended

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<sup>1</sup>On February 12, 2007, Michael J. Astrue became the Commissioner of Social Security. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Michael J. Astrue should be substituted for former Commissioner Jo Anne B. Barnhart as the defendant in this action.

that the claimant's motion for attorney's fees be granted in part and denied in part. Upon submitting this report, Magistrate Judge Seibert informed the parties that if they objected to any portion of his proposed findings of fact and recommendation for disposition, they must file written objections within ten days after being served with a copy of the report. No objections were filed.

## II. Standard of Review

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court is required to make a de novo review of those portions of the magistrate judge's findings to which an objection is made. However, failure to file objections to the magistrate judge's proposed findings and recommendation permits the district court to review the recommendation under the standards that the district court believes are appropriate and, under these circumstances, the parties' right to de novo review is waived. See Webb v. Califano, 468 F. Supp. 825 (E.D. Cal. 1979). Because no objections have been filed in this case, this Court will review the report and recommendation of the magistrate judge for clear error.

## III. Applicable Law

Pursuant to 42 U.S.C. § 406(b)(1), an attorney who successfully represents a Social Security benefits claimant in court may be awarded "a reasonable fee . . . not in excess of 25% of the . . . past-due benefits" awarded to the claimant. 42 U.S.C. § 406(b)(1). The fee is payable "out of, and not in addition to,

the amount of [the] past-due benefits." 42 U.S.C. § 406(b). The attorney for the successful claimant bears the burden of showing the Court "that the fee sought is reasonable for the services rendered." Gisbrecht v. Barnhart, 535 U.S. 789, 807 (2002).

#### IV. Discussion

The claimant moves this Court to award \$22,000.00 in attorney's fees pursuant to 42 U.S.C. § 406(b).<sup>2</sup> Claimant's counsel contends that this amount is reasonable in light of the contingent nature of the fee agreement and the complexity of the case. The Commissioner contends that \$22,000.00 is excessive in light of the hours worked on the case, counsel's hourly billing rate in non-contingency fee cases, and the fact that the case did not involve novel or complex issues.

Magistrate Judge Seibert reviewed the request for attorney's fees and found that an award of \$22,000.00 is unreasonable in light of the services rendered. Magistrate Judge Seibert exercised his discretion and recommends that the award of attorney's fees be reduced to \$13,381.25. This finding is not clearly erroneous and the parties do not object to the reduced award amount. Accordingly, the claimant's counsel is entitled to an award in the amount of \$13,381.25.

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<sup>2</sup> This Court has previously denied a motion by the claimant for an award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). (Docket Number 36.)

V. Conclusion

Because, after a review for clear error, this Court concludes that the magistrate judge's recommendation is proper, this Court hereby AFFIRMS and ADOPTS the magistrate judge's report and recommendation in its entirety. For the reasons stated above, it is ORDERED that the claimant's motion for award of attorney's fees pursuant to 42 U.S.C. § 406(b)(1) is hereby GRANTED IN PART AND DENIED IN PART. The defendant is DIRECTED to pay the amount of \$13,381.25 to claimant's counsel out of the amount of benefits past-due to the claimant.

IT IS SO ORDERED.

The Clerk is directed to transmit a copy of this order to counsel of record herein.

DATED: April 29, 2008

/s/ Frederick P. Stamp, Jr.  
FREDERICK P. STAMP, JR.  
UNITED STATES DISTRICT JUDGE